**IN THE UNITED STATES DISTRICT COURT FOR THE**
**WESTERN DISTRICT OF OKLAHOMA**

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| MARY KATHERINE HARRIS, on behalf of herself and all persons or entities similarly situated, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Case No. CIV-15-94-C |
| CHEVRON U.S.A., INC., ET AL., | ) | |
| Defendants. | ) | |

**DEFENDANTS' MOTION TO DISMISS AND SUPPORTING BRIEF**

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## MOTION TO DISMISS AND SUPPORTING BRIEF

Defendants Chevron U.S.A. Inc., Four Star Oil & Gas Co., McFarland Energy, Inc., Chevron Midcontinent, L.P, and Union Oil Company of California (collectively "Defendants") move the Court to dismiss Plaintiff's Amended Complaint [Doc. #12] under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Despite its length, the Amended Complaint lacks the well-pleaded factual allegations necessary to raise Plaintiff's claims above the speculative level. Therefore, and for the reasons discussed in detail below, the Court should dismiss Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

## I. Introduction

Plaintiff originally filed this putative class action in state court on December 5, 2014. Her Original Petition [Doc. #1-1] alleged that Defendants failed to pay royalties on production from a single well in Grady County for the months of January through October 2014 within the time required by the Oklahoma Production Revenue Standards Act ("PRSA"), 52 Okla. Stat. §§ 570.01 – 570.15. On December 23, 2014, Plaintiff filed an Amended Petition [Doc. #1-2] that substantially broadened her claims. Through her Amended Petition, Plaintiff sought to represent all royalty owners with an interest in Oklahoma oil and gas wells that any Defendant operated, in which any Defendant owned a working interest, or from which any Defendant purchased production. *See* Doc. #1-2, ¶ 1. Without any factual detail at all, Plaintiff baldly alleged that Defendants "underreported production from the said Oklahoma wells to the Royalty Interest Owners, made inappropriate deductions from the proceeds, [and] have failed to timely pay even

the proceeds of the reported production . . ." *Id.* ¶ 2. After Plaintiff served them with both the Original and Amended Petitions on December 29, 2014, Defendants removed this case under the Class Action Fairness Act. *See* Notice of Removal, Doc. #1, ¶ 1.

After removal, Defendants filed a motion to dismiss Plaintiff's Amended Petition because it contained nothing more than conclusory assertions devoid of factual enhancement. *See* Doc. #10. In response, Plaintiff effectively admitted the motion and filed the Amended Complaint at issue here. The Amended Complaint appears to encompass all of the claims asserted in the Original and Amended Petitions, and extends those claims to include alleged underpayment of royalties on oil production. Plaintiff asserts claims for (i) breach of contract; (ii) breach of implied covenant of good faith and fair dealing; (iii) fraud, deceit, and fraudulent concealment; (iv) breach of fiduciary duty; (v) conversion; and (vi) unjust enrichment. She seeks an award of damages, statutory interest, an accounting, and declaratory and injunctive relief on behalf of herself and the following proposed class:

> All present and former owners of royalty interests which burden Oil and gas leases and wells in Oklahoma now or formerly held by Chevron or their predecessors-in-interest, who have been paid or are currently receiving compensation for those royalty interests under Leases on Oil and Natural Gas and Liquids from wells located in the State of Oklahoma.
>
> The Class excludes agencies, departments, or instrumentalities of the State of Oklahoma and the federal government, including the federal government's proprietary status and as trustee for native American/Indian tribes or individual Native American/Indian lessors, or any other person or entity which collects royalties. The Class also excludes the defendants and their predecessors and successors.

Amended Complaint, ¶ 34.

Although the Amended Complaint is substantially longer than the Amended Petition and is more specific about how Plaintiff contends Defendants underpaid royalty, it nonetheless suffers from the same fundamental flaw: Plaintiff's claims lack facial plausibility. As before, the allegations in the Amended Complaint are legal boilerplate the Court should not accept as true. While there are more boilerplate allegations this time around, many of which are repeated multiple times, a lot of repetitive boilerplate is no more sufficient than a little boilerplate. Still lacking are any well-pleaded factual allegations that plausibly suggest Defendants underpaid royalty and tried to hide as much from Plaintiff and the putative class members. Additionally, virtually all allegations directed at Defendants are made "upon information and belief," but Plaintiff does not allege the facts that supposedly support her information or belief. For the reasons that follow, the Court should dismiss Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

## II. Argument

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must contain well-pleaded factual allegations sufficient "to state a claim to relief that is plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). That is, the complaint must contain enough factual allegations "to raise [Plaintiff's] right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Under this standard, "a formulaic recitation of the elements of a cause of action will not suffice." *Khalik*, 671 F.3d at 1191 (quotation omitted). Although the Court must accept all well-pleaded

factual allegations in a complaint as true when ruling on a motion to dismiss, the Court should disregard mere labels and legal conclusions that are masked as factual allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

Plaintiff's Amended Complaint does not satisfy this standard.

## A. The Amended Complaint should be dismissed in its entirety because it fails to comply with the pleading standard articulated by *Twombly* and its progeny.

The Amended Complaint should be dismissed in its entirety for two separate but equally fatal reasons: First, the allegations in the Amended Complaint are virtually all made upon information and belief, and the Amended Complaint fails to disclose the basis for Plaintiff's information or belief. Second, the Amended Complaint impermissibly lumps all Defendants together as if they were a single entity or were acting in concert without making any well-pleaded allegations that plausibly suggest that is the case. Therefore, the Amended Complaint should be dismissed in its entirety.

### *1. The Amended Complaint is deficient because virtually all material allegations are pleaded "upon information and belief" and the Amended Complaint does not allege the basis for Plaintiff's information or belief.*

Except for the allegations relating specifically to Plaintiff, every allegation in the Amended Complaint is pleaded "based upon information and belief."[1] *See* Amended

[1] It should be noted that merely removing the "upon information and belief" allegation will not cure the deficiencies discussed in this section. *Cf. Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 442 (7th Cir. 2011) ("Although Pirelli did not use the phrase 'information and belief' in its complaint, its allegations fall squarely within the definition of the term."). The fundamental problem is that the Amended Complaint does not contain any well-pleaded facts indicating why Plaintiff believes Defendants have breached the oil and gas leases in the manners described. Thus, Plaintiffs' allegations are nothing more than unsupported conclusions

Complaint, Doc. #12, ¶ 13. Post-*Twombly*, federal courts have been skeptical of allegations made only upon information and belief. The Sixth Circuit has observed that "[t]o survive a motion to dismiss, a complaint must plead 'facts' that create a 'plausible inference' of wrongdoing. The mere fact that someone believes something to be true does not create a plausible inference that it is true." *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 931 (6th Cir. 2014) (internal citations and quotations omitted). Similarly, the First Circuit has explained that pleading upon information and belief does not give the plaintiff a license to speculate about the defendant's knowledge or conduct and, to guard against such speculation, the facts upon which plaintiff's information and belief is based should be set out in the complaint. *See Menard v. CSX Transp., Inc.*, 698 F.3d 40, 44 (1st Cir. 2012).

To be sure, *Twombly* and its progeny do not completely forbid the practice of pleading based upon information and belief, at least not when "the [alleged] facts are peculiarly within the possession and control of the defendant." *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010); 5 Charles Alan Wright et al., *Federal Practice & Procedure: Federal Rules of Civil Procedure* § 1224 (3d ed.). Nonetheless, *Twombly* requires the complaint to contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality." *Arista Records*, 604 F.3d at 120 (quotation omitted). Thus, when pleading upon information and belief (or making any conclusory allegation, for that matter), a plaintiff should allege "the grounds for his

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that lack the factual enhancement required by *Twombly* and progeny, regardless of whether the "upon information and belief" label is attached or not.

suspicions" in his complaint. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 443 (7th Cir. 2011); *accord Menard*, 698 F.3d at 45-46 (requiring the plaintiffs to disclose the basis for their information-and-belief allegations on remand or the judgment against them would be reinstated). Absent such grounds, bases, or "factual enhancement," a plaintiff's conclusory allegation that she believes a defendant acted unlawfully will not suffice to state a claim, even when the alleged facts are peculiarly within the defendant's knowledge or control. *See, e.g., Twombly*, 550 U.S. at 555-56 (holding that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.").

Plaintiff's Amended Complaint is full of legal boilerplate but lacks specific alleged facts. The gravamen of Plaintiffs' claims is paragraph 23 of the Amended Complaint, which stretches for approximately 3 pages and identifies 16 ways Defendants supposedly breached Plaintiff's and the putative class members' oil and gas leases. Although the allegations in that paragraph are couched as affirmative factual statements (e.g., "Chevron has breached its contractual obligations . . ."), they should not be accepted as true. Paragraph 23 is nothing more than a laundry list of ways Plaintiff contends Chevron might have breached the subject oil and gas leases. The Amended Complaint is devoid of the factual enhancement necessary to give those allegations facial plausibility. Thus, paragraph 23 is no different than the *Twombly* plaintiff's bald allegations of antitrust conspiracy.

The rest of the Amended Complaint suffers from the same problem. For example, Plaintiff's allegations that Defendants "conspired to deprive Plaintiff and the Class

Members of production proceeds through fraudulent schemes" (¶ 27) and have "taken steps to conceal" the correct production volumes and pricing data (¶ 24) are the types of legal conclusions masked as factual allegations the Court should not accept as true. *See Iqbal*, 556 U.S. at 678-79. The same is true of virtually every paragraph in the Amended Complaint that is directed at Defendants. It does not matter how many times the Amended Complaint states that Defendants "failed to record" something or that Defendants "actively misrepresented and fraudulently concealed data" because those naked assertions add nothing to the sufficiency of the Amended Complaint. Nowhere in the Amended Complaint's 91 paragraphs does Plaintiff allege any factual details regarding what leads her to believe that Defendants are underpaying royalty on Oklahoma oil and gas production and trying to hide as much from Plaintiff and the putative class members. Therefore, Plaintiffs' claims lacks facial plausibility.

Defendants are not asking Plaintiff to allege facts she cannot possibly know, or to disclose at this stage every piece of evidence she may have. But the Federal Rules require Plaintiff to allege the factual basis for her belief that Defendants are breaching the subject oil and gas leases in the manner(s) she contends before the floodgates of class action discovery are open to her.[2] The Amended Complaint fails to do that and should therefore be dismissed.

[2] Such basis must create a plausible inference that Defendants acted unlawfully. Simply pleading it will not save Plaintiff's claims.

### *2. The Amended Complaint is deficient because it fails to distinguish between Defendants.*

When multiple defendants are joined in a lawsuit, the complaint should "make clear exactly who is alleged to have done what to whom . . ." *See Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008)).[3] "A plaintiff suing multiple defendants must allege the basis of his claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2) . . ." *Garcia v. Seterus, Inc.*, No. CV F 12-2049 LJO SAB, 2013 WL 1281565, at *5 (E.D. Cal. March 27, 2013). Thus, a complaint that lumps defendants together and fails to specify what alleged conduct is attributable to which defendant is subject to dismissal. *See, e.g., Swiss Reinsurance Am. Corp. v. Access Gen. Agency, Inc.*, 571 F. Supp. 2d 882, 885 (N.D. Ill. 2008).

Corporations, limited liability companies, and limited partnerships are distinct legal entities. *See Gilbert v. Sec. Fin. Corp. of Okla., Inc.*, 152 P.3d 165, 175 (Okla. 2006). One is ordinarily not liable for the actions or liabilities of another. Despite this, the Amended Complaint lumps all Defendants together as if they are the same legal entity or were acting in concert. However, the Amended Complaint does not contain any well-pleaded allegations suggesting that Defendants acted jointly or in concert, nor does it contain allegations plausibly suggesting Defendants are alter egos of each other. The

[3] Although this statement was made in the qualified immunity context, other district courts in this circuit have applied the same rule outside of that context. *See, e.g., Pena v. Greffet*, 922 F. Supp. 2d 1187, 1253-54 (D.N.M. 2013) (noting the same Rule 12(b)(6) standard applies in qualified immunity and other cases); *Thornton v. PPG Indus., Inc.*, No. CIV-11-252-RAW, 2011 WL 4528508, at *1 (E.D. Okla. Sept. 26, 2011).

only allegation on this point in the Amended Complaint is paragraph 12, which baldly states that "Defendants were each the agent and/or joint venture of the other Defendants and in perming the acts alleged in this Complaint were acting within the course and scope of that agency . . ." That conclusory assertion is insufficient without additional factual enhancement. *Accord Chieftain Royalty Co. v. Dominion Okla. Tex. Exploration & Prod., Inc.*, No. CIV-11-344-R, 2011 WL 9527717, at *2 (W.D. Okla. July 14, 2011) (dismissing alter ego claim because conclusory allegations that the defendant "'conducted all the business of its subsidiary' and that the 'entities were organized and controlled' such 'that they are alter egos of each other'" were insufficient). Therefore, the Amended Complaint should be dismissed.

**B. The Amended Complaint also suffers from deficiencies particular to each of Plaintiff's asserted claims.**

In addition to the general deficiencies discussed above, the Amended Complaint fails to allege sufficient facts to support each of the claims asserted by Plaintiff. The specific deficiencies of each claim will be discussed in turn.

***1. The Amended Complaint fails to state a claim for breach of contract.***

The touchstone of Plaintiff's breach of contract claim is that Defendants have underpaid royalty to Plaintiff on Defendants' Oklahoma oil and gas production. Paragraph 23 of the Amended Complaint merely describes various ways Defendants allegedly did so.

Ordinarily, an oil and gas lessee's duty to pay royalty is a function of an underlying oil and gas lease with the royalty owner. *See Mittelstaedt v. Santa Fe*

*Minerals, Inc.*, 954 P.2d 1203, 1205-06 (Okla. 1998). Unless Plaintiff has been force-pooled (which is likewise not alleged in the Amended Complaint), whether royalty is owed to Plaintiff and, if so, what royalty is owed, will depend on the existence and terms of an oil and gas lease or leases covering Plaintiff's property. Moreover, Plaintiff cannot assert claims on behalf of absent class members whose leases create materially different royalty obligations than her own. *See Foster v. Merit Energy Co.*, 289 F.R.D. 653, 660 (W.D. Okla. 2012) ("Rule 23 . . . does not permit plaintiff to proceed as an oil patch ombudsman, litigating the legal meaning of lease language that has not been shown to be materially indistinguishable from hers."). *Accord Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1219 (10th Cir. 2013); *Foster v. Apache Corp.*, 285 F.R.D. 632, 641-42 (W.D. Okla. 2012).

As a result, in order to plead a claim for breach of lease, Plaintiff must allege facts plausibly suggesting each Defendant breached the royalty provisions contained in Plaintiff's individual oil and gas lease. To satisfy this requirement, the Amended Complaint must at the very least describe the relevant provisions of Plaintiff's lease, identify the property or well subject to the lease, and allege that one of the Defendants is the lessee under that lease or has some other relationship with Plaintiff that would give rise to the duty to pay her royalty. *See Hitch Enters., Inc. v. Cimarex Energy Co.*, 859 F. Supp. 2d 1249, 1257 (W.D. Okla. 2012) (quoting and following *Chieftain Royalty*, 2011 WL 9527717, at *2)). Because it does not describe or attach Plaintiff's individual lease(s), or specify which Defendant is the lessee under any such lease, the Amended Complaint fails to raise Plaintiff's alleged right to relief above the speculative level. *See*

*Chieftain Royalty*, 2011 WL 9527717, at *2. Therefore, Plaintiff's breach of contract claim should be dismissed.

### ***2. Plaintiff's claim for breach of the implied covenant of good faith and fair dealing should be dismissed.***

Plaintiff contends that Defendants have "acted in bad faith by not giving equal consideration to the interests of the plaintiff and Class members as they have their own interests." (Amended Complaint, ¶ 12). It is unclear what Plaintiff intends by this claim. Courts have recognized that "[e]very contract in Oklahoma contains an implied duty of good faith and fair dealing," but the breach of that duty is ordinarily no different than any other breach of contract. *See Wathor v. Mut. Assur. Adm'rs, Inc.*, 87 P.3d 559, 561 (Okla. 2004). If that is what Plaintiff intends by this claim, it fails for the same reasons as her other breach of contract claim.

To the extent Plaintiff seeks to recover tort damages on a theory similar to the insurance bad faith tort recognized in *Christian v. Am. Home Assur. Co.*, 577 P.2d 899 (Okla. 1977), that claim is unavailable in the circumstances alleged here. "Oklahoma law has primarily limited application of the independent tort of bad faith to cases between an insurer and its insured because of the special relationship characterized by disparate bargaining power and a noncommercial purpose." *Access Endocrine, Diabetes, & Thyroid Ctr., P.C. v. Health Care Serv. Corp.*, No. CIV-14-441-C, 2014 WL 4385760, at *3 (W.D. Okla. Sept. 4, 2014). Indeed, the Oklahoma Supreme Court has "expressed reluctance to extend tort recovery for bad faith beyond the insurance field." *Embry v. Innovative Aftermarket Sys. L.P.*, 247 P.3d 1158, 1160 (Okla. 2010). The "special

relationship" necessary to give rise to tort liability for bad faith requires an adhesion contract that is intended to eliminate risk. *Id.* Tort liability is appropriate in such circumstances for breach of the duty of good faith because breach of that duty "precipitates the precise economic hardship the contract was intended to avoid." *Id.*

An oil and gas lease does not create a similar relationship. As Judge DeGiusti explained when dismissing a similar claim, "The purpose of an oil and gas lease is to seek commercial advantage and take associated commercial risks; the purpose is not the elimination of risk as is the purpose of an insurance contract." *Cimarex Energy Co. v. Calhoon*, No. CIV-11-525-D, 2012 WL 1371386, at *4 (W.D. Okla. April 19, 2012). Breach of an oil and gas lease does not precipitate any harm the lease was designed to avoid.[4] Therefore, the oil and gas lessor-lessee relationship is not the type of "special relationship" that gives rise to bad faith tort liability. *See id.* Other judges in this district have reached the same conclusion. *Hitch Enterprises*, 859 F. Supp. 2d at 1263-64 (West, J.); *Chieftain Royalty*, 2011 WL 9527717, at *3 (Russell, J.); *Morrison ex rel. Haar Family Trust v. Anadarko Petrol. Corp.*, No. CIV-10-135-M, 2010 WL 2721397, at *4 (W.D. Okla. July 6, 2010) (Miles-LaGrange, C.J.). Accordingly, the Court should dismiss Plaintiff's claim for breach of the covenant of good faith and fair dealing.

[4] Nor are oil and gas contracts true adhesion contracts because many landowners hire counsel and/or negotiate their own terms or lease forms.

### *3. The Amended Complaint fails to state a claim for fraud, deceit, or fraudulent concealment.*

#### *a. The Amended Complaint does not plead fraud with particularity.*

The Amended Complaint asserts a claim for "fraud, deceit, and fraudulent concealment." *See* Amended Complaint, ¶¶ 62-65. In addition to satisfying *Twombly*'s plausibility requirements, fraud must be pled with particularity. *See* Fed. R. Civ. P. 9(b). This rule requires a pleading to identify the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1171 (10th Cir. 2010) (quotation omitted). Plaintiff's Amended Complaint fails to do so.

In support of her fraud claim, Plaintiff alleges that Defendants have:

> [A]mong other things, uniformly provided Plaintiff and members of the class with uninformative, false, and misleading monthly remittance statements that fail to disclose and/or conceal the breaches described above, including, but not limited to, the reduction in the Royalties due to [Defendants'] retention of oil, the underreporting gross production volume and/or failure to calculate and pay royalties based on the actual gross production volumes, and the failure to calculate and pay royalties based on agreed pricing terms, all in violation of the governing lease agreements.

Amended Complaint, ¶ 25. Stated differently, Plaintiff contends that the monthly remittance statements Defendants sent Plaintiff and the putative class members contained false production and pricing data. This allegation is insufficient under Rule 9(b) for several reasons.

First, the Amended Complaint does not identify who made the alleged misrepresentations to Plaintiff. Instead, it lumps all Defendants together without specifying which Defendant(s) were allegedly responsible for making the alleged misrepresentations. Second, the Amended Complaint does not adequately describe what

alleged misrepresentations were made. The conclusory allegation that production and proceeds were underreported is not sufficient because, as discussed at length above, there is no context or factual enhancement to make that statement plausible. As a result, the Court should not accept it as true. Additionally, the Amended Complaint fails to identify when the alleged misrepresentations took place. Plaintiff alleges the representations were made monthly, but she does not identify any discrete period of time over which they allegedly took place. This is particularly important here because Plaintiff's claims do not contain any temporal limitation and portions of Plaintiff's claims appear to be time barred. Therefore, the Amended Complaint fails to plead fraud with particularity, and Plaintiff's claim for fraud, deceit, and fraudulent concealment should be dismissed.

#### *b. The Amended Complaint does not state a claim for actual or constructive fraud.*

Even if the Court concludes Plaintiff has pled fraud with particularity, the Amended Complaint does not plausibly suggest Plaintiff could prevail on any fraud claim. In Oklahoma, actionable fraud is generally divided into two types: actual and constructive. In order to prevail on a claim of actual fraud, Plaintiff will have to prove that: (1) Defendants made an affirmative, material misrepresentation; (2) Defendants knew their representation was false or made the representation with a reckless disregard for its truth; (3) Defendants made the misrepresentation with the intention that it be acted upon by Plaintiffs; and (4) Plaintiff's relied upon the misrepresentation to their detriment. *Bowman v. Presley*, 212 P.3d 1210, 1218 (Okla. 2009); *see also* 15 Okla. Stat. § 58. To prevail on a claim for constructive fraud, Plaintiff must prove that Defendants breached

some legal or equitable duty owed to her and that by doing so Defendants misled Plaintiff to her detriment and gained some advantage at her expense. *See* 15 Okla. Stat. § 59; *Croslin v. Enerlex, Inc.*, 308 P.3d 1041, 1046 (Okla. 2013). Unlike actual fraud, constructive fraud does not require proof of fraudulent intent. However, "both actual fraud and constructive fraud require detrimental reliance by the person complaining." *Howell v. Texaco Inc.*, 112 P.3d 1154, 1161 (Okla. 2005).

In this case, the Amended Complaint does not contain any well-pleaded allegations suggesting Plaintiff or the putative class members relied to their detriment on Defendants' alleged misrepresentations. On this score, Plaintiff contends the allegedly false check stubs "caused Plaintiff and all Class Members to reasonably and actually believe that all Royalties have been properly paid and that Chevron has properly accounted to Plaintiff and all Class Members for the Royalties they were owed" and that, as a result, Plaintiff and the putative class members lacked the information necessary to pursue their claims. (Amended Complaint, ¶¶ 27, 29). That allegation is apparently directed at tolling the applicable statutes of limitations. That statement does not, however, support a separate claim for damages because it does not plausibly suggest Plaintiff or the class members suffered any legally cognizable injury. *See, e.g., AG Equip. Co. v. AIG Life Ins. Co.*, No. 07-CV-0556-CVE-PJC, 2008 WL 4570319, at *3 (N.D. Okla. Oct. 10, 2008) (observing that "fraudulent concealment is typically raised as response to a statute of limitations defense, rather than as a separate claim for relief."). As a result, the Amended Complaint fails to state a claim for actual or constructive fraud, and the Court should therefore dismiss Plaintiff's fraud and deceit claim.

##### *c.* *Plaintiff's fraudulent concealment claim should be dismissed.*

The Amended Complaint also asserts a "claim" for fraudulent concealment." Although it is not independently actionable, fraudulent concealment may toll a statute of limitations when the defendant engages in "actual artifice or some affirmative act of concealment, or some misrepresentation which induces the other party to inaction . . ." *Masquat v. Daimler Chrysler Corp.*, 195 P.3d 48, 55 (Okla. 2008). In this case, however, the Amended Complaint does not plausibly suggest any Defendant actively concealed or misrepresented any information to Plaintiff or the absent class members. As discussed in Part II.A.1, above, Plaintiff's bald assertion that "Chevron actively misrepresented and fraudulent concealed data" (Amended Complaint, ¶ 29) lacks sufficient factual detail and should not be accepted as true. The Amended Complaint contains no well-pleaded facts that plausibly suggest Defendants made any misrepresentations. Therefore, Plaintiff's fraudulent concealment claim should be dismissed and should not provide a basis for tolling the applicable statutes of limitations.

#### *4.* *The Amended Complaint fails to state a claim for breach of fiduciary duty because Plaintiff has not alleged that she or any putative class member owns royalty interests that are subject to a unitization order from the Oklahoma Corporation Commission.*

An oil and gas lease does not create a fiduciary relationship. 52 Okla. Stat. § 902(2); *Howell*, 112 P.3d at 1160-61 (Okla. 2004). In Oklahoma, there is certain support for the notion that an oil and gas producer owes a fiduciary duty to its royalty owners, under certain circumstances, when the property in question is subject to a unitization order issued by the Oklahoma Corporation Commission that supersedes the underlying

leases and changes the rights and obligations of the parties.[5] *See Howell*, 112 P.3d at 1160. Although the Amended Complaint states in passing that Defendants are "the operator[s] of the units in which the Leases are included," Amended Complaint, ¶ 66, that conclusory assertion is insufficient to state a claim for breach of fiduciary duty. Unlike the complaint at issue in *Hitch Enterprises*, 859 F. Supp. 2d at 1262-63, the Amended Complaint does not affirmatively allege that Plaintiff's or the class members' properties are subject to any OCC unitization order, nor does the Amended Complaint identify the types of units that Defendants supposedly operate.[6] Therefore, Plaintiffs' breach of fiduciary duty claim should be dismissed.

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[5] When reading Oklahoma decisions on this point, "the [C]ourt [should be] mindful that the term 'fiduciary' is easily bandied-about without precision." *Tenneco Oil Co. v. Bogert*, 630 F. Supp. 961, 967 (W.D. Okla. 1986). The term 'fiduciary' does not give rise to trustee-like duties in every context in which it is used. Rather, the scope and extent of the duties imposed vary depending on the circumstances. *See id.* (quoting Restatement (Second) of Trusts § 2, cmt. *b* (1959)).

[6] At least after May 8, 2012, the effective date of the Energy Litigation Reform Act, an oil and gas producer could only potentially owe its royalty owners a fiduciary duty when it operates a secondary-recovery unit established under 52 Okla. Stat. §§ 287.1 – 287.15. *See* 52 Okla. Stat. § 902(2); *Young v. West Edmond Hunton Lime Unit*, 275 P.2d 304, 309 (Okla. 1954). Prior to that date, some Oklahoma courts concluded that a mere drilling and spacing order issued under 52 Okla. Stat. § 87.1(a) was a "unitization order" that could create a fiduciary relationship. *See, e.g., Hebble v. Shell W. E & P, Inc.*, 238 P.3d 939, 943 (Oka. Civ. App. 2009) (relying on *Leck v. Continental Oil Co.*, 800 P.2d 224, 229 (Okla. 1989)). That decision has been criticized, however, and there are unresolved questions regarding whether the Oklahoma Supreme Court's decision in *Leck* is controlling or distinguishable. *See generally* Brad Secrist, Note, *Not All "Units" Are Created Equal: How* Hebble v. Shell W. E & P, Inc. *Missed an Opportunity to Curb the Expansion of Fiduciary Obligations in Oklahoma Oil and Gas Law*, 65 Okla. L. Rev. 157, 171-73 (Fall 2012) (arguing the *Hebble* court misapplied *Leck* and other cases for several reasons). The Court need not resolve this issue on the present motion because the Amended Complaint does not allege Plaintiff's or the putative class members' properties are subject to any unitization order.

### *5. The Amended Complaint fails to state a claim for conversion because Plaintiff is seeking to recover money from Defendants, not separately identifiable personal property.*

Conversion is the wrongful exercise of dominion or control over the tangible personal property of another. *Welty v. Martinaire of Okla., Inc.*, 867 P.2d 1273, 1275 (Okla. 1994). An action for conversion does not ordinarily lie for the recovery of money because money is an intangible asset. *See Shebester v. Triple Crown Insurers*, 826 P.2d 603, 608 (Okla. 1992). Plaintiff has not alleged that she or any class member was entitled or had elected to take their royalty share in kind. Instead, she seeks to recover for the alleged underpayment of royalty money. Thus, Plaintiff's allegations "place this case squarely in the realm of the debtor-creditor relationship, for which a conversion claim does not lie." *Hitch Enterprises*, 859 F. Supp. 2d at 1264 (quotation omitted). Therefore, Plaintiff's conversion claim should be dismissed.

### *6. The Amended Complaint fails to state a claim for unjust enrichment.*

In order to prevail on her claim for unjust enrichment, Plaintiff must show that Defendants have obtained a benefit at her expense that, in equity and good conscience, belongs to Plaintiff. *See Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1030 (10th Cir. 2007) (applying Oklahoma law). Unjust enrichment is an equitable remedy that is unavailable when the plaintiff has an adequate remedy at law. *Krug v. Helmerich & Payne, Inc.*, 320 P.3d 1012, 1021-22 (Okla. 2013).

In this case, Plaintiff contends Defendants have allegedly withheld royalties that should have been paid to Plaintiff and the absent class members. Amended Complaint, ¶ 76. For the reasons discussed in part II.A, however, the Amended Complaint lacks

enough factual detail to plausibly suggest that is the case. Therefore, Plaintiff's unjust enrichment claim should be dismissed.

***7. Plaintiff's requests for an accounting, declaratory judgment, and injunctive relief should be dismissed because those "claims" are remedies that depend on resolution of Plaintiff's other claims and fail for the same reasons.***

Plaintiff also seeks an accounting, "a declaration of the parties' respective rights and obligations," and a mandatory injunction requiring Defendants to alter their methodology for calculating and paying royalties. *See generally* Amended Complaint, ¶¶ 78-89. Accounting is an equitable remedy. *Hitch Enterprises*, 859 F. Supp. 2d at 1258 (citing *Fleet v. Sanguine, Ltd.*, 854 P.2d 892 (Okla. 1993)). So is injunctive relief. *See Sharp v. 251st Street Landfill, Inc.*, 925 P.2d 546, 549 (Okla. 1996). They are not stand-alone claims for relief. And in this case, Plaintiff's request for declaratory relief is also derivative of her other claims. Therefore, these purported "claims" should be dismissed for the reasons discussed above.

***8. Plaintiff's claim for late payment of royalty should be dismissed.***

Finally, Plaintiff asserts that Defendants have failed to pay royalty within the time required by the Oklahoma Production Revenue Standards Act and have further failed to pay the requisite interest thereon. *See* Amended Complaint, ¶¶ 90-91. Defendants are unclear as to what Plaintiff intends by this claim. Reading paragraph 90-91 in isolation, it appears that Plaintiff is seeking interest on the royalty payments she alleges that Defendants did not make. To the extent that is what Plaintiff intends, this "claim" is

more properly thought of as interest on or an element of damages for her breach of contract and other claims, and the Court should dismiss it for the same reasons.

In light of the claim asserted in Plaintiff's Original Petition [Doc. #1-1], it is also possible that Plaintiff is seeking to recover allegedly unpaid interest on royalty payments that were made to her or the putative class members but that were allegedly not made within the time required by the PRSA. To the extent that is what Plaintiff is claiming, the Amended Complaint is far too vague. Plaintiff has not alleged any facts plausibly suggesting Defendants have a policy or practice of making late royalty payments, nor does the Amended Complaint describe any specific instance where a Defendant failed to pay royalty to Plaintiff within the time required by the PRSA and failed to include the required interest. Therefore, Plaintiff's claim for allegedly untimely royalty payments should be dismissed.

## III. Conclusion

For the reasons discussed above, the Court should dismiss Plaintiff's Amended Complaint [Doc. #12] under Rule 12(b)(6) for failure to state claim upon which relief can be granted.

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## CERTIFICATE OF SERVICE

This certifies that on the 13th day of April, 2015, I electronically transmitted the above document to Clerk of Court using the CM/ECF system for filing. A Notice of Electronic Filing will be automatically transmitted to:

Alan W. Agee alan.agee@gacmlaw.com

*/s/ Patrick L. Stein*
Patrick L. Stein